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C O N F I D E N T I A L SECTION 01 OF 03 THE HAGUE 002201

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E.O. 12958: DECL: 1.6 FIVE YEARS AFTER CLOSURE ICTY

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SUBJECT: ICTY: COUNSEL IMPOSED ON MILOSEVIC

REF: THE HAGUE 2196

Classified By: Legal Counselor Clifton M. Johnson per 1.5(d).

1. (SBU) Summary: As anticipated, Trial Chamber Three of the International Criminal Tribunal for the Former Yugoslavia (ICTY) decided on September 2 to assign counsel to assist in the defense of Slobodan Milosevic. The court decided that the counsel should be the amici curiae (friends of the Court), led by British lawyer Steven Kay. The decision capped a dramatic hearing, in which the Office of the Prosecutor (OTP), citing medical reports, alleged that Milosevic was taking unprescribed medication and failing to follow his prescribed therapeutic regime in order to manipulate his health and, consequently, the pace of the trial. Milosevic, visibly frustrated with the proceedings, argued repeatedly and in vain that assignment of counsel deprived him of his "fundamental rights" to defend himself, and he promised to appeal the decision. When asked whether he wanted to comment on "modalities" for assigning counsel, Milosevic throw his hands in the air and refused to offer any suggestions, foreshadowing the posture he might take with respect to his new lawyers. End summary.

2. (C) As soon as Milosevic concluded his politically focused opening defense statement (see reftel), the trial chamber turned to what has become the key issue of the trial -- whether Milosevic could continue to defend himself in light of his recurring bouts with hypertension. The hearing considered recent medical reports, issued as recently as last week. First, both cardiologists -- a Dutch physician with long experience examining the accused, and an esteemed Belgian doctor brought in this summer for a second opinion -- concluded that Milosevic's current condition of hypertension makes him unfit to serve as his own defense counsel without assistance. Second, the doctors identified not only that Milosevic was failing to follow the therapeutic regime prescribed for him over the past year (e.g., by continuing to smoke) but also that he was taking an unprescribed medication without their supervision. Lead prosecutor Nice indicated that the doctors believe that the unprescribed medication caused further deterioration in his condition, even though the same medication -- which Milosevic refused last year because of its capacity to undermine his focus and make him lethargic -- was offered by the Dutch doctor last year. Unsupervised medication, the doctors said, was a serious threat to his ability to control the hypertension.

3. (C) Nice interpreted the drug use as a manipulation of the tribunal. Agreeing with Judge Kwon that the underlying health condition would be the basis for assigning defense counsel, Nice nonetheless added that the "manipulation" amounted to "obstruction", demonstrating that counsel must be imposed. For his part, Milosevic had no apologies. He said that he had rejected elements of the doctors' proposed medical regimen because they caused fatigue and interfered with his work. Instead, he consulted with his own doctor, who had been treating him for ten years, to create a different regime. The regime involved some rest and now, he said, his blood pressure had normalized.

4. (C) Note. Registry officials supervising the detention facility are reviewing ways in which they might better control the "smuggling" of medication into the facility. Prison warden McFadden had warned Registry officials in the spring that the Court's order to provide Milosevic with a special room at the facility to prepare his defense and have privileged discussions with potential witnesses was "something he would never do in any other prison" because of the potential security breach. A senior Registry official told embassy legal officer that they have ways to make it more difficult for such "contraband" to be brought into the facility, and they have confiscated items such as mobile phones and small electronics, among other things, in the past. The medication, however, poses special problems. For instance, material received from his legal associates, including the extensive files stored in his preparation room, and contacts with his consular representatives, are privileged, making it difficult to determine whether such individuals are bringing him the drugs and whether they are hidden among his privileged documents. Other detainees may be helping him as well. End note.

15. (SBU) The medical reports provided the trial chamber with a firm basis on which to assign counsel, though Milosevic made last-minute pleas in an effort to avoid that outcome. He requested that the Tribunal order yet another set of medical evaluations, not by the doctor from "Belgium, the country which is the seat of the NATO pact," but by a team of Russian, Serb and Greek doctors. (The Tribunal, Judge Robinson dissenting, rejected his request.) He called the effort to impose counsel a "manipulation aimed at depriving me of my right to speak here and to speak the truth." When asked by Judge Robinson why he made his request for another medical evaluation at the last moment, he responded that, "until today . . . it never crossed my mind that it might be at all possible that counsel would be imposed on me." Milosevic made clear repeatedly that the matter was one of "principle" for him -- he would not accept assigned counsel. The press gallery erupted in laughter, though amicus Kay suggested to the chamber that Milosevic's assertion was "probably right."

16. (SBU) The trial chamber's decision this morning to assign counsel was based on Milosevic's "severe essential hypertension" which could lead to a life-threatening "hypertensive emergency." Further delays in the trial, the Chamber concluded, would result from continued self-representation. Moreover, Judge Robinson said, the right to self-representation under the Tribunal statute is not unfettered -- the trial chamber has authority to assign counsel if "in the interest of justice." A plainly agitated Milosevic interjected, "I told you yesterday" that such a move "violates my fundamental rights," but Judge Robinson cut him off and told him that he had had an opportunity to make his point already and that he had avenues to object outside the trial chamber. Milosevic, for the first time in emboffs' knowledge, said, "I want the appeals chamber to consider this opinion."

17. (SBU) The remaining issue for the Court was the "modalities" for assigning counsel. Nice argued for a version of defense counsel in which the counsel would have ultimate authority over defense decisions, including witnesses, but he noted that the accused could be "completely in control" if he uses his own appointed counsel. The amicus were somewhat more restrained, suggesting that Milosevic first be given seven days to nominate his own counsel. Only if he refuses to exercise that option would the Registrar be requested to appoint counsel. The counsel, moreover, would be guided by the Tribunal's code of conduct for defense counsel -- any instructions to the counsel from the bench, Kay suggested, should be guided by the code of conduct. Kay was clearly not in favor of a strict position, such as Nice's, in which defense counsel decisions always trump the accused's. In response to a question from the bench, Kay was coy about whether he would accept the role as defense counsel. Robinson finally turned to Milosevic for his views. Throwing up his hands in a gesture mixed with frustration and disgust, he said, "Then go ahead: deal with it," and refused to engage further on the subject.

18. (SBU) The trial chamber's subsequent decision rejected Kay's suggestion of a seven-day period during which Milosevic could appoint his own counsel, saying there was every indication that Milosevic would not do so. It then ordered the Registrar to seek to appoint the amici, Kay and his associate, Gillian Higgins, as counsel, and that he should report back on the progress of such an appointment by 1:00 p.m. Friday, September 3. (It is unclear why the ruling did not specify the third amicus, Timothy McCormack, or whether the amicus will continue to exist in any capacity.) It will subsequently issue an order dealing with further modalities of defense counsel.

19. (C) Comment: The trial chamber's decision to appoint counsel was in many respects inevitable, given the medical reports and the history of health-related delays in the case. Whether the decision will actually help the troubled proceeding toward a successful conclusion depends on whether and how Milosevic decides to interact with counsel and whether counsel moves beyond a posture of deference toward Milosevic and adopts one of real advocacy. Based on Milosevic's and the Amici's conduct to date, we anticipate that Milosevic, at least publicly, will seek to shunt counsel aside and continue to argue the case on his own (and it is unclear the extent to which counsel would challenge him). The real test will arise when Milosevic's blood pressure, as is inevitable, precludes his participation for a few days and the assigned counsel is placed in the role of advancing the case on his own for the first time.

19. (C) Comment continued. One positive sign in this uncertainty is that the trial chamber has become something more of a team effort than was the case under the late Judge Richard May. All three judges, including the usually silent Kwon, actively participated in the hearing, asked probing questions, and showed decisiveness. Judge Bonomy, clearly not a shy newcomer, demonstrated a real eagerness to see

proceedings move forward expeditiously and with decorum -- frequently leaning over to convey his thoughts to the presiding judge. Presiding Judge Robinson, long deferential to the accused, cut him off several times to avoid irrelevant and lengthy diatribes. With a frustrated Milosevic before them, they will likely need all the collaboration they can muster to ensure that the trial moves forward with expedition and credibility. End comment.
RUSSEL